92-1985

No.

Supreme Court, U.S
FILED
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

ARTURO HERRERA-MERAS

Petitioner,

v.

UNITED STATES

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

APPELLANT::
ARTURO HERRERA-MERAS
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QUESTIONS PRESENTED FOR REVIEW

A. DID THE TRIAL COURT COMMIT PLAIN ERROR BY ADMITTING THE ALLEGED WEIGHT OF THE COCAINE WITHOUT AN ADEQUATE FOUNDATION FOR THE ACCURACY OF THE SCALE?

B. DID THE PROSECUTION FAIL TO PROVE THE WEIGHT OF THE COCAINE CONTAINING SUBSTANCE BY A PREPONDERANCE OF THE EVIDENCE?

C. DID THE TRIAL COURT COMMIT PLAIN ERROR BY COMPELLING ARTURO HERRERA-MERAS TO TESTIFY IN VIOLATION OF HIS RIGHT NOT TO INCRIMINATE HIMSELF?

D. DID THE TRIAL COURT ABUSE ITS DISCRETION AND COMMIT PLAIN ERROR BY PROHIBITING DEFENSE COUNSEL FROM READING AND SUBMITTING MULTIPLE COPIES OF ONE VERSION OF THE TRANSCRIPT OF DEFENDANT'S ALLEGED TAPED DISCUSSION AFTER PERMITTING THE PROSECUTION TO READ AND DISTRIBUTE MULTIPLE COPIES OF ITS VERSION OF THE TRANSCRIPT?

E. WAS THE TRANSFER TO FEDERAL COURT AFTER DEFENDANT REFUSED TO PLEA IN STATE COURT A VIOLATION OF DUE PROCESS AND EQUAL PROTECTION?

PARTIES TO PROCEEDING

PETITIONER: ARTURO HERRERA-MERAS

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

No. _____

ARTURO HERRERA-MERAS

Petitioner,

v.

UNITED STATES

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner, Arturo Herrera-Meras, prays that a Writ of Certiorari issue to review the Judgment of United States Court of Appeals for the Ninth Circuit entered in this case on January 21, 1993.

REFERENCE TO OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS DELIVERED IN THE CASE BY OTHER COURTS

United States of America v. Arturo Herrera-Meras

United States Court of Appeals for the Ninth Circuit

No. 91-30300

CT/AG#: CR-90-297-JET

Entered January 21, 1993.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on January 21, 1993. App. 1A. The Court has jurisdiction pursuant to 28 U.S.C. ξ 1254(1)

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS

United States Constitution Fifth Amendment

United States Constitution Fourteenth Amendment

21 U.S.C. 841(a)

21 U.S.C. 841(a)(1)

21 U.S.C. 841(b)

28 U.S.C. 1291

28 U.S.C. 1295(a)(2)

Federal Rule of Evidence 103(d)

Federal Rule of Evidence 403

Federal Rule of Evidence 901(a)

Federal Rule of Evidence 901(b)(9)

National Institute of Standards and Technology, United States Department of Commerce, SPECIFICATIONS, TOLERANCES AND OTHER TECHNICAL REQUIREMENTS FOR WEIGHING AND MEASURING DEVICES, NIST 44 1992

.STATEMENT OF THE CASE

Beginning in the later part of July, 1990 and continuing through August 5, 1990, as part of an investigation by the Mount Vernon Police Department of

narcotics trafficking activities, an informant of the Mount Vernon Police Department placed a series of taped telephone calls to Francisco Meras for the purpose of discussing a delivery of cocaine.

In the afternoon of August 5, 1990, Meras, his wife and two children, and the petitioner Arturo Herrera-Meras arrived at the informant's residence in Washington. The parties entered a garage door, and Meras placed several packages, alleged by the prosecution to be a controlled substance, on the hood of the car. Following some discussions, the informant left the garage and gave a prearranged arrest signal to the officers in the area. The informant was wearing a body wire and the above discussions were recorded.

Shortly thereafter the officers entered the garage and arrested Francisco Meras and petitioner Arturo Herrera-Meras.

On August 24th, 1990 the Skagit County prosecuting attorney, Mr. Michael E. Rickert, charged petitioner Arturo Herrera-Meras by information with the crime of delivery of a controlled substance in violation of

RCW 69.50.401(a) and also with the crime of conspiracy to deliver a controlled substance in violation of RCW 69.50.401(a)(1)(i). Mr. Arturo Herrera-Meras was arraigned on these charges in Skagit County Superior Court on September 6, 1990. Attorney William McCann was thereafter appointed by the Skagit County Superior Court to represent Mr. Arturo Herrera-Meras in Skagit County Superior Court on these charges.

On October 4, 1990 by amended information Skagit County prosecutor authority, Mr. Michael Rickert, thereafter charged Mr. Francisco Meras with the crimes of delivery of a controlled substance in violation of RCW 69.50.401(a) and conspiracy to deliver a controlled substance in violation of RCW 69.50.401(a) (1)(i).

Mr. Herrera-Meras, was offered the opportunity to plead guilty to the delivery of controlled substance charge in Skagit County Superior Court, whereafter the prosecutor would move to dismiss the conspiracy to deliver a controlled substance charge that was currently pending against Mr. Herrera-Meras. Mr. Herrera-Meras was further told that through his attorney, that if he did not

plead guilty to that proposal by the prosecutor, the matter would be referred to the U.S. Attorney's Office for possible federal prosecution.

Mr. Herrera-Meras refused to accept the prosecutor's plea offer and thereafter prepared to proceed through trial on this matter. One week before Mr. Herrera-Meras was to go to trial in Skagit County Superior Court on the charges, they were dismissed on Prosecutor Rickert's motion.

On October 17, 1990 Mr. Herrera-Meras was charged by information with intent to distribute cocaine in violation of Title 21 U.S.C. sections 841(a) and 841(b)(1)(A), and Title 18 U.S.C. section 2.

On November 15, 1990 Mr. Herrera-Meras was thereafter indicted on charges of conspiring to distribute cocaine in violation of Title 21 U.S.C., Sections 846 and 841(b)(1)(A) and also charged with possession with intent to distribute cocaine in violation of Title 21 U.S.C., Sections 841(a)(1) and 841(b)(1)(A).

Mr. Francisco Meras had also been charged in Skagit County Superior Court for delivery of cocaine in

violation of RCW 69.50.401(a) and conspiracy to deliver cocaine in violation of RCW 69.50.401(a)(1)(i) for transactions that he allegedly participated in with Mr. Arturo Herrera-Meras on August 5, 1990. Yet, Mr. Francisco Meras, was allowed to plead guilty to a single charge of delivery of cocaine in Skagit County Superior Court.

Prior to his trial date, Mr. Arturo Herrera-Meras moved to dismiss the charges against him, asserting that the transfer of his case to federal court was in retaliation for exercising his constitutional right to trial, and violated due process and equal protection. The motion was denied.

At the trial of Mr. Arturo Herrera-Meras, Michael Hoover, the forensic science witness for the United States, gave testimony regarding the substances allegedly seized from the defendants. He stated that he had tested 5,274.5 grams (5.27 kilos) of this substance and found that this amount contained cocaine. He also stated that he did not test an additional 363.2 grams of the white powdery substance allegedly seized from the defendants for cocaine content.

During cross examination, defense counsel questioned Mr. Hoover about the reliability of the scale he used to weigh the substance. Mr. Hoover acknowledged that the scale was purchased before he was employed at the forensic lab, that it was of unknown age, and he did not check to see if the scale was certified prior to recording the weight of the substance at issue. He also stated that he "believed" the scale had been certified by the Mettler Company within the year prior to recording the weights, but did not definitely confirm certification.

In addition, the prosecution called Francisco Meras as a witness against the defendant Arturo Herrera-Meras. The prosecutor continually asked Francisco Meras if Arturo Herrera-Meras had supplied him with the cocaine that was seized on August 5th, but was unable to get an answer that satisfied him. Eventually the court excused the jury and asked if Francisco Meras was invoking the Fifth Amendment. Subsequently, the court interpreted the witness's answer to mean that he was invoking the Fifth Amendment. After determining that Mr. Francisco Meras had pled guilty in State Court, (although he had not yet

been sentenced), the Court apparently decided that the Fifth Amendment did not apply and ordered him to answer the prosecution or face incarceration for contempt of court.

Subsequently, the Court called the jury back and asked Francisco Meras if Arturo Herrera-Meras had supplied him with the cocaine that was seized by the law enforcement officers. Francisco Meras answered "yes." On cross examination by defense counsel, Mr. Meras apparently modified or recanted his previous answer by indicating that Arturo Herrera-Meras "was not part of this cocaine deal" and was going to Skagit County to work in the fields.

In addition, the trial court judge permitted the prosecutor to read transcripts of taped conversations related to the alleged cocaine deal involving the defendant and also permitted him to pass out multiple copies of the transcript to the jury.

Defense Counsel requested that he be allowed to do the same with a different transcript version of the same conversation but the court denied the request and only

allowed him to submit one copy to the jury. The court did not allow defense counsel to read the transcript to the jury.

The transcript that was offered by the defendant had been prepared by Agent Kelly O'Neill, one of the police officers who was listening to the body wire tape transaction at the time that Mr. Arturo Herrera-Meras was arrested. Mr. O'Neill had an extensive academic and personal background in Spanish.. The transcript presented by the prosecution was prepared by Guiselda Ruiz, a federal certified court interpreter.

BASIS FOR FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE

The District Court has jurisdiction pursuant to 18 U.S.C. 3231 based on the charge that defendant violated 21 U.S.C. 841 (a)(1).

The Appeals Court has jurisdiction pursuant to 28 U.S.C. 1291.

The Judgment appealed from is an appealable order as defined in 28 U.S.C. 1295 (a)(2). The judgment is final and disposes of all claims with respect to all parties.

The judgment appealed from was entered on the criminal docket on July 12, 1991.

The Notice of Appeal was timely filed on July 12, 1991 in accordance with F.R.A.P. (4)(b).

REASONS RELIED UPON FOR ISSUANCE OF WRIT

The 9th Circuit Court's decision concerning issues involving the sufficiency of evidence needed to support the accuracy of a scale and the weight of cocaine is directly in conflict with the 2nd Circuit Court's decision in U.S. v. Pirre, 927 F.2d 694, (2nd Cir. 1991).

In U.S. v. Pirre, 927 F.2d 694, 696 (2nd Cir. 1991), the government's scale used to weigh an illicit substance was calibrated daily, (emphasis added), and had a margin of error of only hundredths of a gram. By comparison, the flimsy testimony of the government regarding the reliability of the scale involved in this case fell far short of being an adequate basis for admitting the reading.

The United States Department of Commerce issues an annual handbook which enumerates testing requirements for weighing devices. National Institute of Standards and Technology, United States Department of Commerce,

SPECIFICATIONS, TOLERANCES AND OTHER TECHNICAL REQUIREMENTS FOR WEIGHING AND MEASURING DEVICES, NIST Handbook 44 1992, (hereinafter referred to as "Handbook").

The requirements of the Handbook apply to weighing equipment used in law enforcement activities and were not followed in this matter. This lack of authentication and identification were not in accordance with Federal Rules of Evidence 901(a) and 901(b). This evidence is crucial as it goes directly to the sentence length of an individual convicted of a drug offense. In this particular case a term of five years minimum as compared to ten years minimum. 28 U.S.C. 841(b)

This case also presents the concern of the defendant's right to a fair and impartial trial and the judicial abuse of that right as guaranteed in the Amendment V of the United Sates Constitution. The District Court's improper compelling of a co-defendant to answer a key prosecution question violated the defendant's right to a fair and impartial trial.

In addition allowing the prosecution to read and distribute multiple copies of a transcript of a meeting between the defendant and the co-defendant but only allowing the defendant to give one copy of his version of the transcript to the jury violated the defendant's right to a fair and impartial trial, thus denying the defendant's due process rights. The district court's allowing the prosecution to read and distribute multiple copies of a transcript of a meeting between the defendant and the co-defendant was in conflict with Federal Rule of Evidence 403

Lastly this case involves important constitutional rights concerning a defendant's right to due process and equal protection. A defendant has a right to demand a trial. That right applies to both the state and federal government. To punish a defendant for exercising that right violates and destroys the constitutional right. Mr. Herrera-Meras has been denied both due process and equal protection of law in violation of both the Fifth and Fourteenth Amendments to the United States Constitution. Mr. Herrera-Meras was arraigned in Skagit County Superior Court on the drug charges which encompass the instant case. Mr. Herrera-

Meras had a right to be there. To punish Mr. Herrera-Meras for exercising his right to trial flies in the face of both due process and equal protection.

In United States v. Roberts, 726 F. Supp. 1359 (D.D.C. 1989) [reversed on other grounds 934 F.2d 353 (D.C. Cir. 1991)] the court dismissed charges against the defendants finding that the defendants due process rights (and potentially equal protection rights, see p. 1370 note 60 indicating that equal protection component incorporated into Due Process Clause of Fifth Amendment as a measure of arbitrary treatment) and speedy trial rights were violated. The United States attorney for the District of Columbia obtained indictments against the defendants in U.S. District Court after the defendants were moving toward their trial dates on charges encompassing the same alleged acts in the Superior Court of the District of Columbia. In that case Judge Green found a pattern of conduct by the U.S. attorney for the District of Columbia which Judge Green felt created due process violations including attempts to avoid the Speedy Trial Act, Title 18 U.S.C. section 3161(b).

The Court's concern is with fairness and due process. It is not necessary for the fight against the illegal drug dealers or other criminals, nor is it fair and legal, to shortcut the Constitution by resorting to procedures which violate the requirements of the Due Process Clause. U.S. v. Roberts, supra at 1373.

In a follow-up case, United States v. Holland, 729 F. Supp. 125 (D.D.C. 1990) Judge Green found that the defendant's due process rights were also violated when he was indicted in the U.S. District Court for the District of Columbia after not pleading guilty to a charge encompassing the same allegations in the D.C. Superior Court. Indeed, in that case Judge Green found that the Due Process Clause to the Constitution was violated even though the U.S. attorney's office for the D.C. District testified that the fact that the defendant refused to plead guilty in the D.C. Superior Court had nothing to do with the defendant then being indicted in U.S. District Court. Judge Green went on to find that despite that testimony, the evidence showed just the opposite, i.e. that defendants were being penalized for their refusal to plead guilty in D.C.

Superior Court. In the instant case the evidence of this retaliation is not even hidden. Defendant Herrera-Meras was told that if he did not plead guilty to the drug charges filed against him in Skagit County Superior Court, he would then be transferred to federal court for prosecution. Based on that explicit and obvious retaliation testimony, it is respectfully submitted that Mr. Herrera-Meras' due process and equal protection rights under both the Fifth and Fourteenth Amendments to the United States Constitution have been violated.

The District Court's decision in Holland, supra was reversed by the District of Columbia Court of Appeals. U.S. v. Mills, 925 F.2d 455 (D.C. Cir. 1991). The appeals court stated that the U.S. Attorney for the District of Columbia may elect to prosecute on federal rather than District charges, but is constitutionally prohibited from basing this decision on the exercise of a legal right. Mills at 461.

In Mr. Herrera's case, the prosecution was transferred to federal court based on his assertion of the right to trial. This court should decline to follow the

District of Columbia Circuit opinion and instead should rule that due process and equal protection violations have occurred.

Furthermore, the decision of the court of Appeals in U.S. v. Mills, 925 F.2d 455 (D.C. Cir. 1991) was vacated and the case set for rehearing in U.S.v. Mills, 933 F. 2d 1042 (D.C. Cir. 1991). Therefore, it is questionable whether the reversal of the District Court's decision in Holland will stand.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ARTURO HERRERA-MERAS

APPENDIX

Amendment IV [1791]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizure, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V [1791]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

18 U.S.C. 841. Prohibited Acts A

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally-

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance;

(b) Penalties

Except as otherwise provided in section 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving-

(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of--

(II) cocaine

such person shall be sentenced to a term of imprisonment which may not be less than 10 years.

(B) In the case of a violation of subsection (a) of this section involving--

(ii) 500 grams or more of a mixture or substance containing a detectable amount of--

(II) cocaine

such person shall be sentenced to a term of imprisonment which may not be less than 5 years.

1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decision of the district courts of the United States.

18 U.S.C. 1295.

(a) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction

(2) of an appeal from a final decision of a district court of the United States

RCW 69.50.401. Prohibited acts: A--Penalties. (a) Except as authorized by this chapter, it is unlawful for any person

to manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance.

(1) Any person who violates this subsection with respect to:

(i) a controlled substance classified in Schedule I or II which is a narcotic drug, is guilty of a crime and upon conviction may be imprisoned for not more than ten years.

F.R.A.P.

(b) Appeals in Criminal Cases. In a criminal case the notice of appeal by a defendant shall be filed in the district court within 10 days after the entry of (i) the judgment or order appealed from or (ii) a notice of appeal by the Government.

Rule 103. Rulings on Evidence

(d) Plain error. Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court.

Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Rule 901.

Requirement of Authentication or Identification

(a) General provision. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(b) Illustrations. By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

(9) Process or system. Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.

National Institute of Standards and Technology, United States Department of Commerce, SPECIFICATIONS, TOLERANCES AND OTHER TECHNICAL REQUIREMENTS FOR WEIGHING AND MEASURING DEVICES, NIST Handbook 44 1992,

The requirements of the Handbook apply to weighing equipment used in law enforcement activities.

1. Commercial and Law-Enforcement Equipment. - These specifications, tolerances, and other technical requirements apply as follows:

To weighing and measuring equipment in official use for the enforcement of law or for the collection of statistical information by government agencies.

.2. Code Application. This General Code shall apply to all classes of devices as covered in the specific codes. The specific code requirements supersede General Code requirements in all cases of conflict. (Amended 1972).

Handbook, sections G-A.1., G-A.2., pg. 1-1 (in part)

The Handbook's requirements of weighing equipment include the following:

1. Designation of weighing devices into accuracy classes of I, II, III, III, or IIII according to the parameters set forth on Table 3 on page 2-10 of the Handbook. (Handbook section S.5.1., section S.5.2., page 2-9) (effective date January 1986).

2. Except on class I scales, the Handbook requires installment of a security seal which must be broken before making an adjustment which can affect the performance of an electronic device. (Handbook section S.1.11., pg. 2-6) (Effective date January 1, 1979)

3. Except on class I scales, the Handbook requires that the weighing device be designed with provisions for use of a security seal or other security device before any change that affects the meteorological integrity of the device can be made to any electronic mechanism. (Handbook section S.1.11., pg. 2-6) (last amendment 1991).

4. Handbook section N.1.1., pg. 2-13, refers to use of the "Increasing Load Test." This test is

described in the definitions section of the Handbook at pg. D-6 as "The normal basic performance test for a scale in which observations are made as increments of test load are successfully added to the load-receiving element of the scale."

5. Handbook section N.1.2., pg. 2-13, refers to the "Decreasing-Load Test." The test is described in the definitions section, pg. D-4, of the Handbook as "A test for automatic-indicating scales only, wherein the performance of the scale is tested as the load is reduced."

6. Handbook section N.1.5., pg. 2-14, refers to the "Discrimination Test", (added 1985), discrimination is described in the definition section, pg. D-4 as "The value of the test load on the load-receiving element of the scale that produce a specified minimum change of the indicated or recorded value on the scale."

7. Handbook section N.1.6., pg. 2-14, requires an RFI test where RFI conditions are "usual and customary" (added 1986). The definitions section, pg. D-11, describes radio frequency interference (RFI) as "a type of electrical disturbance that, when introduced into

electronic and electrical circuits, may cause deviations from the normally expected performance."

8. Handbook section N.1.9., pg. 2-14, requires testing for zero load balance charge after removal of any test load, and states that the zero load balance should not change by more than the allowable minimum tolerance. The definitions, pg. D-15, describe zero load balance as "A correct weight indication or representation of zero when there is no load on the load-receiving element."

9. Tolerance ranges for the various categories of weighing devices are set forth starting at pg. 2-17 and 2-20 of the Handbook.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

ARTURO HERRERA-MERAS

Defendant- Appellant

APPEAL FROM the United States District Court for the Western District of Washington (Tacoma) and was duly submitted. Entered January 21, 1993.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the _____ judgment of the District Court in this cause be, and hereby is AFFIRMED.

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ARTURO HERRERA-MERAS,

Defendant-Appellant.

No. 91-30300

D.C. No. CR 90-297-JET

Appeal from the United States District Court for the

Western District of Washington

Jack E. Tanner, District Judge, Presiding

Argued and Submitted November 3, 1992

Seattle, Washington

Before: WRIGHT, HUG, and POOLE, Circuit Judges

Appellant Arturo Herrera-Meras appeals his conviction following a jury trial based on (1) the district court's admission of evidence relating to the alleged weight of cocaine, (2) the district court's admission of compelled testimony, (3) the district court's rulings regarding the defense's version of a transcript of recorded conversations

and (4) his federal prosecution after refusing to plead to charges in state court. We affirm.

I

After a jury trial in the United States District Court for the Western District of Washington, Herrera-Meras was convicted on the following drug charges: one count of conspiracy to distribute five kilograms or more of cocaine in violation of 21 U.S.C. 846 and one count of possession with intent to distribute five kilograms or more of cocaine in violation of 21 U.S.C. 841 (a) (1). Herrera-Meras was subsequently sentenced to 121 months imprisonment.

Herrera-Meras was arrested based on information the Mount Vernon, Washington Police obtained from an informant. The informant arranged a drug sale with Francisco Meras to occur on August 5, 1990 at a house located in Mount Vernon. The police recorded eleven conversations between Meras and the informant.

The Mount Vernon police observed the August 5 sale and also recorded the conversation that took place between the informant, Meras and Herrera-Meras. The conversations, which were in Spanish, were

contemporaneously interpreted and transcribed by a customs agent.

The sale took place as follows: After a brief discussion, the three men entered the garage adjacent to the house and closed the garage door. The three then discussed the quantity of the cocaine, and Meras stated that five and one-half kilograms were present.

After the informant left the garage and went into the house, the police went to the garage and announced themselves. They immediately forced the door open when they heard the sound of breaking glass. They arrested Meras and Herrera-Meras inside the garage and seized five and one-half kilogram-sized packages of cocaine. The seized packages were subsequently tested and weighed by Michael Hoover of the Washington State Patrol Crime Laboratory. The tests revealed that the packages contained cocaine with a combined weight of 5365.8 grams.

Following his arrest, Herrera-Meras was held in the Skagit County jail. On August 24, 1990, the Skagit County prosecutor charged Herrera-Meras with the crime of delivery of cocaine and conspiracy to deliver cocaine, in

violation of RCW 69.50.401 (a) and 69.50.401 (a) (l) (i), respectively. Herrera-Meras was arraigned on these charges in Skagit County Superior Court on September 6, 1990.

On October 4, 1990, the Skagit County prosecutor charged Herrera-Meras by amended information with the crimes of possession of cocaine with the intent to deliver and conspiracy to deliver cocaine, in violation of RCW 69.50.401 (a) and 69.50.407, respectively. Herrera-Meras was offered the opportunity to plead guilty to the charge of possession of cocaine with the intent to deliver, whereupon the prosecutor would dismiss the conspiracy charge. Herrera-Meras was informed that the state prosecutor would request an exceptional sentence above the guideline range but that he would not be prosecuted federally if he pleaded guilty. He was also told that if he did not accept the please offer, that his case would be referred to the United States Attorney's Office for possible federal prosecution. Herrera-Meras refused the offer, and his case was referred to the United States Attorney's Office, which accepted the case for prosecution. On October 17, 1990,

Herrera-Meras was charged by information on federal drug charges. On October 23, 1990, approximately one week before Herrera-Meras' state case was to go to trial, the charges were dismissed without prejudice on the prosecutor's motion. Herrera-Meras was indicted on the above-named federal drug charges on November 15, 1990.

During Herrera-Meras' trial, Michael Hoover testified regarding the packages seized by the Mount Vernon police. During cross-examination, Hoover acknowledged that the scale used to weigh the packages was purchased before he became employed at the lab, was of unknown age and had not been certified prior to weighing the packages.

Meras also testified for the government. During his direct examination, the court excused the jury to inquire whether Meras was invoking the privilege against self-incrimination. After determining that Meras had already pleaded guilty to his state court charges, the court concluded that the privilege was inapplicable and ordered Meras to answer questions concerning how the packages had been supplied or face incarceration for contempt of

court. Subsequently, in the presence of the jury, Meras testified that Herrera-Meras had supplied him with the packages.

The district court allowed the prosecution to read a transcript of the conversation taped by the Mount Vernon police that was prepared by a certified court reporter and permitted it to distribute copies of the transcript to the jury. The district court denied Herrera-Meras' request to read and distribute the custom agent's version of the transcript and instead only allowed him to submit one copy to the jury.

I. **The Admission of the Alleged Weight of the Cocaine**

Herrera-Meras did not object to the sufficiency of the evidence supporting the alleged weight of the cocaine at trial. Therefore, the court will only review this claim for plain error.

U.S. v. Hernandez, 876 F.2d 774, 777 (9th Cir.), cert. denied, 493 U.S. 863 (1989). A plain error is a highly prejudicial error affecting substantial right. Id. (citations omitted)

Herrera-Meras argues that the district court should have excluded the government's expert's testimony regarding the weight of the packages because the scale used to weight the packages had not been certified before the packages were weighed. The district court has wide discretion in determining whether scientific tests are sufficiently reliable to permit expert testimony based thereon, and its decision to admit or exclude such testimony will not be disturbed unless shown to be manifestly erroneous. United States v. Gwaltney, 790 F.2d 1378, 1381-82 (9th Cir. 1986), cert. denied, 479 U.S. 1104 (1987) (citations omitted). In this case, there is evidence of the reliability of the scale. Although he admitted that the scale had not been certified prior to weighing the packages, Hoover testified that he had previously observed routine visits by manufacturer's representatives for the purpose of ensuring that the balance of the scale was accurate. Thus, the district court did not err in finding that the scale was sufficiently reliable. The district court also properly determined that the criticism by Herrera-Meras of the weighing of the packages went to the weight of the expert's

testimony rather than its admissibility. Gwaltney, 790 F.2d at 1382.

Furthermore, even excluding Hoover's testimony, the evidence at trial was sufficient to establish the weight of the packages. The transcript of Meras' statement that there were "five and a half" kilograms, the investigator's testimony that he recovered five kilogram-sized packages and Meras' trial testimony that the brought five and one-half kilograms to the house were sufficient proof of the weight of the packages. Therefore, the district court did not commit plain error.

II. **Meras' Compelled Testimony**

Herrera-Meras contends that Meras' testimony was compelled in violation of the Fifth Amendment and that as a result he was improperly convicted of the conspiracy charge against him. However, because Herrera-Meras cannot vicariously assert Meras' Fifth Amendment rights, he has no standing to raise this issue on appeal. United States v. Ward, 973 973 F.2d 730, 734 (9th Cir. 1992); United States V. Valdovinos-Valdovinos, 743 F.2d 1436, 1437-38 (9th Cir. 1984), cert. denied, 469 U.S. 1114 (1985).

III. **The Exclusion of the Transcript**

Herrera-Meras argues that the district court committed plain error in allowing the government to read and circulate its version of the transcript of the taped conversations to the jury and in not allowing him to read and distribute his version of the transcript to the jury in the same manner. These evidentiary rulings are reviewed for an abuse of discretion. United States v. Taghipour, 964 F.2d 908, 910 (9th Cir.), cert. denied, 113 S. Ct. 283 (1992); United States v. Emmert, 829 F.2d 805, 808 (9th Cir. 1987). Because Meras did not object to these rulings, they are reviewed for plain error. Hernandez, 876 F.2d at 777.

This court has held that government-prepared transcripts may be used by the jury so long as the district court takes steps to ensure the accuracy of the transcripts. United States v. Hsieh Hui Mei Chen, 754 F. 2d 817, 824 (9th Cir.), cert. denied, 471 U.S. 1139 (1985). In this case, the district court required the government to certify its version of the transcript and allowed the defense counsel to

introduce an alternate transcript to the jury. The district court did not abuse its discretion in this regards.

There is also no showing that the district court allowed the "needless presentation of cumulative evidence" in violation of Federal Rule of Evidence 403. Although the governments' transcript was admitted in evidence in addition to being read and circulated to the jury, Herrera-Meras has not shown that the jurors gave it duplicative or undue consideration.. "Absent anything more specific than a presumption that the transcripts were used by the jury and a generalized claim that the jury must have been prejudiced, we find no error in the transcripts being in the jury room." United States v. Costa, 691 F.2d 1358, 1363 (11th Cir. 1982), cited in Taghipour, 964 F.2d at 910.

The district court did not commit plain error in not allowing Herrera-Meras to distribute copies of a second version of the transcript to the jury. The jury was allowed to consider the alternative transcript; a single copy of the transcript was admitted in evidence. Contrary to Herrera-Meras' argument, there is no basis for finding that the jury would have given the alternative transcript different weight

or come to a different verdict if this transcript had been presented to them differently. Although the two transcripts are very different, neither is exculpatory.

IV. **The Subsequent Prosecution in Federal Court**

Herrera-Meras argues that the institution of a federal prosecution subsequent to his refusal to plead to state court criminal charges was unconstitutional. Herrera-Meras properly raised this issue in the district court. We review de novo the district court's denial of his motion for dismissal. U.S. v. Cook, 859 F.2d 777, 778 (9th Cir. 1988).

Using the possibility of more sever federal charges as a bargaining tool in plea negotiations is not unconstitutional. In Bordenkircher v. Hayes, 434 U.S. 357, 365 (1978), the Supreme Court held that presenting a defendant with the unpleasant alternative of foregoing trial or facing charges on which he is plainly subject to prosecution was not unconstitutional. While noting that "[t]o punish a person because he has done what the law plainly entitles him to do is a due process violation...." The Court stated that "in the 'give and take' of plea bargaining,

there is no such element of punishment or retaliation so long as the accused is free to accept or reject the prosecution's offer." Id. at 363-64. Furthermore, "by tolerating and encouraging the negotiation of pleas, this Court has necessarily accepted as constitutionally legitimate the simple reality that the prosecutor's interests at the bargaining table is to persuade the defendant to forego his right to plead not guilty." Id. at 364.

The fact that the state prosecutor referred Herrera-Meras' case to the federal government after the plea negotiations failed and subsequently dismissed the state charges against him also is not unconstitutional. Because Herrera-Meras' conduct violated both the laws of the State of Washington and the United States, either or both could have prosecuted him. See United States v. Figueroa-Soto, 938 F.2d 1015, 1020 (9th Cir. 1991), cert. denied, 112 S. Ct. 1181 (1992). Moreover, in U.S. v. Ballestar, 763 F.2d 368 (9th Cir.), cert. denied, 474 U.S. 842 (1985), this court held that a state prosecutor's statement to a defendant that he would refer the case to federal authorities if the defendant caused his state charges to be dismissed was not

improper. Id. at 369-370. This court also stated that "[t]he role of a separate sovereign in bringing the increased charges minimized the likelihood of prosecutorial abuse." Id.

These holdings dictate that the state prosecutor's use of the potential of a federal prosecution as a bargaining tool during plea negotiation, thereby leaving Herrera-Meras with the choice of foregoing his right to trial or possibly facing more severe federal charges was not unconstitutional. Herrera-Meras: subsequent prosecution in federal and not state court is also not unconstitutional. The district court's judgment is AFFIRMED.

This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Pursuant to Federal Rule of Appellate Procedure 34 (e), the court heard argument on behalf of the appellee.

FOOTNOTES:

1. The prosecutor made a similar plea offer to Meras, who accepted it and was allowed to plead guilty to one

charge of delivery of cocaine in Skagit County Superior Court. Meras has not been federally prosecuted.

2. Prior to trial, Herrera-Meras moved to dismiss the charges against him, asserting the transfer of his case to federal court was in retaliation for exercising his constitutional right to trial and violated due process and equal protection. This motion was denied.

3. Hoover also testified that he believed the scale had been certified in the previous year.

4. The government is required to prove the weight of the packages by a preponderance of the evidence. United States v. Soleto-Rivera, 931 F. 2d 1317, 1319 (9th Cir. 1991).

5. Furthermore, the defense introduced no contradictory evidence on this issue

6. The customs agent who made the transcript proffered by the defense admitted that it was a rough draft and not of professional quality. The agent also suggested that the government obtain a transcript of the tape from a federally certified court reporter.

7. To the extent that Herrera-Meras challenges the United States' indictment of him as vindictive or selective, his claim has no merit. There are no facts showing that the United States acted in retaliation in bringing charges against Herrera-Meras. Absent an allegation of vindictive or selective prosecution, a prosecutor's decision to pursue federal instead of state charges is not unconstitutional. U.S. v. Reyes, 966 F.2d 508, 509 (9th Cir.), cert. denied, 113 S. Ct. 355 (1992), citing U.S. v. Burt, 619 F.2d 831, 837-38 (9th Cir. 1980). This circuit has recently held that a prosecutor's charging decision cannot be judicially reviewed absent a prima facie showing that it rested on impermissible basis, such as gender, race or denial of a constitutional right. United States v. Redondo-Lemos, 955 F.2d 1296, 1300-01 (9th Cir 1992)